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Baker v. Arbor Drugs, Inc.: Pharmacists Beware of Voluntarily Assuming the Duty to Protect Against Harmful Drug Interactions

Richard M. Eldridge* and Michael F. Smith**

I. Introduction

The following concoction is a recipe for spawning litigation. First, mix in a liberal dose of media sensationalism. "Danger at the Drugstore." Headlines such as this one from the August 26, 1996, issue of U.S. News & World Report heighten public awareness of the potential hazards of prescription drug interactions.

Second, stir in a healthy serving of competition. "According to the National Association of Retail Druggists, 3,000 independent pharmacies have gone out of business in the past two years—victims of competition from big drug, grocery, and department-store chains."1 Prescription drugs have become the "loss leaders" that are used to lure customers into stores.

Third, mix with managed care. "HMOs have slashed reimbursement rates to the point where pharmacies often get reimbursed at rates well below what the drugs cost them."2

Finally, complete the mixture with pharmacies' mass media advertising about computer programs that detect potential drug interaction. One pharmacy's advertisement reads: "Every prescription filled for you is entered in our Patient Profile System so we can check for drug interactions and allergies. . . . [w]e will warn you of any unexpected side effects."3

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2. Id.
3. Id. at 50.
Fueled by this mixture, litigants increasingly are asking courts to reevaluate traditional holdings and extend the limits of legal liability of pharmacies and pharmacists. Recent case law developments indicate that the historical limits of legal liability may be altered significantly. In *Baker v. Arbor Drugs, Inc.*, the Michigan Court of Appeals ruled that a pharmacy could voluntarily assume a duty to prevent harmful drug interactions to its customers. The case arose after the pharmacy implemented a computerized drug interaction detection system. The Michigan Supreme Court recently denied Arbor Drugs' appeal.

This article briefly examines the history of the common law concept of voluntary assumption of duty, and analyzes how *Baker* fits within the natural course of judicial evolution of that concept. After this article analyzes the *Baker* decision, it then examines the future implications of *Baker* and demonstrates how the *Baker* analysis likely will lead to future liability of pharmacies and pharmacists based on the concept of voluntary assumption of duty. Finally, this article provides a logical method for restricting *Baker*’s application, consistent with public policy.

II. A BRIEF HISTORY OF THE CONCEPT OF VOLUNTARY ASSUMPTION OF DUTY

“A duty, in negligence cases, may be defined as an obligation, to which the law will give recognition and effect, to conform to a particular standard of conduct toward another.” The legal concept of a duty is the first critical element in a common law negligence cause of action —without a duty, a person cannot be held liable to another. Courts impose a duty upon persons within the context of various human relationships following a balancing of socially relevant factors. As society’s ideas of human rela-

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7. The elements of a negligence cause of action are generally as follows: “(1) duty; (2) breach of that duty; (3) that the breach of that duty be the proximate cause of plaintiff's injury; and (4) that plaintiff did in fact suffer injury.” Schmanski v. Church of St. Casimir of Wells, 67 N.W.2d 644, 646 (Minn. 1954).
8. See, e.g., South Carolina Elec. & Gas Co. v. Utilities Constr. Co., 135 S.E.2d 613, 617 (S.C. 1964) (noting that without the existence of a duty, no negligence cause of action exists). Courts usually will determine first whether a duty exists, because, in the absence of a duty, there is no need to conduct any further analysis with the remaining elements of a negligence action. See, e.g., id.; Smith v. Day, 538 A.2d 157, 158 (Vt. 1987).
tionships and socially relevant factors evolve, the law defining the duties within the context of human relationships evolves with them.10

When determining the fictionalized concept of a duty under particular circumstances, courts consciously or unconsciously balance the current socially relevant factors.11 Based on earlier social conditions, very early in the context of negligence law, a deep-rooted difference between "misfeasance"12 and "nonfeasance"13 arose that still controls in modern negligence cases.14 In the early common law, one who injured another by a positive or affirmative act was held liable without regard to fault.15 The courts, however, were too occupied with misfeasance to be overly concerned with nonfeasance.16 "[T]he law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger, even if the other is in danger of losing his life."17

11. A recent comprehensive statement of the current socially relevant factors in a typical negligence context dictates consideration of the following factors:
   (1) foreseeability of harm to plaintiff; (2) degree of certainty that plaintiff suffered injury; (3) closeness of connection between defendant's conduct and injury suffered; (4) moral blame attached to defendant's conduct; (5) policy of preventing future harm; (6) extent of burden to defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and (7) availability, cost, and prevalence of insurance for the risk involved.
12. "Misfeasance" is defined as "[t]he improper performance of some act which a person may lawfully do." BLACK'S LAW DICTIONARY 1000 (6th ed. 1990).
13. "Nonfeasance" is defined as "[t]he omission of an act which a person ought to do."
14. W. PAGE KEETON ET AL., supra note 6, § 56, at 373. Prosser and Keeton explain the basis for the differentiation:
   The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs. The highly individualistic philosophy of the older common law had no great difficulty in working out restraints upon the commission of affirmative acts of harm, but shrank from converting the courts into an agency for forcing men to help one another.
16. See Osterlind v. Hill, 160 N.E. 301 (Mass. 1928) (holding that expert swimmer, with a boat and rope at hand, who sees another drowning, is not liable for failing to rescue drowning victim).
17. W. PAGE KEETON ET AL., supra note 6, § 56, at 375.
One area, however, where the law did not have difficulty imposing a duty was in the context of voluntary assumption of duty.\textsuperscript{18} That area of the law is summarized in Section 323 of the Restatement (Second) of Torts:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.\textsuperscript{19}

It is now well-settled in American jurisprudence that where one voluntarily assumes a duty to another, the failure to perform that duty reasonably will result in liability.\textsuperscript{20} Additionally, Section 323 of the

\textsuperscript{18} Id. at 373-82. See, e.g., Walker v. Smith, 1 Wash. C.C. 152, 4 Dall. 389, 29 Fed. Cas. 54 (CC. Pa. 1804) (finding agent breached duty where goods were sent to an agent to be delivered upon receipt of payment, and he delivered goods without payment); see also O'Leary v. Erie R.R., 62 N.E. 346 (N.Y. 1900) (holding defendant liable for plaintiff employee's injuries where defendant had adopted a practice of setting brakes on grain cars going downgrade for the protection of plaintiff employee, but failed to do so on one occasion).

\textsuperscript{19} \textsc{Restatement (Second) of Torts \textsection 323 (1964)}.

Restatement (Second) of Torts likely will guide those as yet silent jurisdictions to accept the concept of voluntary assumption of duty. It is likely that any court, when confronted with a factual scenario where a pharmacy provides some type of harmful drug interaction detection system to its customers, will hold that the pharmacy assumed a duty to prevent harmful drug interactions. The pharmacy’s failure reasonably to perform that duty will result in liability for all injuries proximately caused by such failure. The voluntary nature of Arbor Drugs’ actions in Baker, of implementing a computerized drug interaction detection system, gave rise to Arbor Drugs’ duty to its customers. Consequently, Arbor Drugs incurred liability for injuries arising from its failure to reasonably perform that duty with due care.

III. The Baker Decision

A. Facts

Robert Baker was taking Parnate, a prescription drug, for depression after an attempted suicide in October of 1989. On February 26, 1992, Robert developed a cold. He visited Dr. Henry Tomashevski at the Park Medical Center. During this visit, Robert informed Dr. Tomashevski that he was taking Parnate. Dr. Tomashevski prescribed two medications, Ceftin and Tavist-D.

Robert filled his prescription at the Arbor Drugs store in Wyandotte, where he normally filled his prescription for Parnate. Penelope Serafin, the pharmacist who filled Robert’s prescription for Ceftin and

21. Baker v. Arbor Drugs, Inc., 544 N.W.2d 727, 729 (Mich. Ct. App. 1996). Parnate is grouped in a class of drugs known as monoamine oxidase inhibitors and can cause severe complications if taken with certain foods or other medications. Id. Robert Baker was aware of the dangers of adverse reactions with Parnate and strictly followed instructions given by his physician, Dr. Arthur Hewitt, and the drug’s manufacturer. Id.

22. Id.

23. Id.

24. Id.

25. Id. Dr. Tomashevski noted in Robert’s medical records that Robert was taking Parnate. Id.

26. Id. Ceftin is an antibiotic. Id.

27. Id. Tavist-D is a decongestant. Id.

28. Id. Robert had his Parnate prescription filled 11 days earlier at that Arbor Drugs store in Wyandotte. Id.
Tavist-D, indicated that she was not aware Robert was taking Parnate when she filled his prescriptions.  

At the time Robert had his Ceftin and Tavist-D prescriptions filled, Arbor Drugs had a system in operation known as "Arbortech Plus," a drug interaction detection computer system. A drug interaction was detected between Tavist-D and Parnate on the Arbortech Plus, but the pharmacist did not see the interaction indicated on the computer, probably because a technician overrode the interaction notification. The pharmacist was certain that the computer detected the interaction because the letter "I" appeared next to the price on the prescription label. Serafim also testified that she was aware that Parnate and Tavist-D should not be taken at the same time.  

After having his prescriptions filled, Robert took the prescribed doses at home. Later that evening, Robert complained to his wife, Robin, that he was not feeling well. Robin took him to the hospital where he was diagnosed as having suffered a stroke. The stroke was the direct result of ingesting Parnate and Tavist-D at the same time.  

On June 22, 1992, Robert and Robin filed suit against Arbor Drugs, Inc., Dr. Tomashevski, and Park Medical Center. The claims against Dr. Tomashevski and Park Medical Center were settled out of court. On July 16, 1992, Robert committed suicide. In his suicide note, Robert claimed that, among other things, the stroke was too much for him to handle. Robin, as personal representative of Robert’s estate, pursued the lawsuit against Arbor Drugs, alleging negligence and other causes of action.  

Arbor Drugs sought summary judgment on the negligence allegations,
arguing that it did not owe a duty to Robert. The trial court agreed, ruling that there was no duty on the part of the pharmacy, and that liability rested with the prescribing doctor. The decedent's wife appealed.

B. Disposition on Appeal

The issue on appeal was whether a pharmacy voluntarily owed a duty to its customers to prevent prescription drug interactions through the implementation of its drug interaction detection system. Robin argued that Arbor Drugs had voluntarily assumed such a duty to Robert by implementing, advertising, and using its Arbortech Plus drug interaction detection system designed specifically for that purpose. The Michigan Court of Appeals ruled that Arbor Drugs voluntarily assumed a duty of care to Robert when it implemented the Arbortech Plus system, and then advertised that the system would detect and prevent harmful drug interactions for its customers.

C. Analysis

In finding that the pharmacy had assumed a duty to Robert by implementing a computerized drug interaction detection system for its customers, the Michigan Court of Appeals was careful to narrow the application of its holding to the facts specifically presented. This holding does not signal a new development in the law binding all pharmacies and pharmacists to a duty to detect possible drug interactions in filling all prescriptions. Rather, the holding was limited to the situation where a pharmacist or pharmacy voluntarily assumes a duty, but fails to perform that duty with ordinary care. Because Arbor Drugs advertised its Arbortech Plus computer system as a means of detecting harmful drug interactions, it had assumed the duty to its customers to detect and warn against potential harmful drug interactions.

1. Pharmacies Are Not Liable for Correctly Filling Prescriptions

The Michigan Court of Appeals began its analysis by stating the general rule that pharmacies are not liable for correctly filling a prescrip-
tion. Although pharmacies are held to a very high standard of care in filling prescriptions, when pharmacies supply the drug prescribed by a doctor, there is generally no liability attached for injuries arising as a result of the patient’s consumption of that drug.

2. Pharmacies Do Not Owe a Duty to Warn of Possible Side Effects of Prescription Drugs

The Michigan court also noted that pharmacies generally owe no duty to consumers to warn of possible side effects of prescription drugs. The court relied on earlier case law, concluding that a pharmacy does not owe a duty to consumers to warn of possible side effects of a prescribed drug where the prescription is proper on its face and neither the physician nor the manufacturer has required the pharmacy to give any warning to the consumer. The court was mindful to note that the authority relied upon for this general proposition expressly reserved consideration of the issue of whether a pharmacy could be liable where the pharmacy knows of a particular patient’s unique problems or where a pharmacy fills two incompatible prescriptions at the same time.

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49. Id. at 730. Compare infra note 70 and cases cited therein.

50. Baker, 544 N.W.2d at 730. This conclusion is supported by the public policy of not requiring pharmacists to provide an oversight function to physicians by questioning every physician’s prescription. See, e.g., McKee v. American Home Prod. Corp., 782 P.2d 1045 (Wash. 1989). A different conclusion is warranted when an error is on the face of the prescription. See, e.g., Gassen v. East Jefferson Gen. Hosp., 628 So. 2d 256 (La. Ct. App. 1993) (holding “a pharmacist has a limited duty to inquire or verify from the prescribing physician clear errors or mistakes in the prescription”); Peoples Serv. Drug Stores v. Somerville, 158 A. 12 (Md. 1932) (holding a pharmacist “cannot escape liability in compounding and dispensing poisons in deadly and unusual doses even though the physician’s prescription called for such dosage”); and Kampe v. Howard Starke Prof. Pharmacy, 841 S.W.2d 223 (Mo. Ct. App. 1992) (concluding that pharmacist had a duty to inquire or verify the appropriateness of a prescription when it is irregular on its face).

51. Baker, 544 N.W.2d at 730.

52. Id. (citing Stebbins v. Concord Wrigley Drugs, Inc., 416 N.W.2d 381 (Mich. Ct. App. 1987)). In Adkins v. Mong, 425 N.W.2d 151 (Mich. Ct. App. 1988), the Michigan Court of Appeals also held that a pharmacy had no duty to warn a consumer of the potential side effects of the substances it was dispensing, provided the prescriptions submitted were all valid on their face. A pharmacy owes no duty to monitor and intervene in a customer’s reliance on drugs prescribed by a licensed treating physician. Id. See also infra note 69 and cases cited therein.

53. Hand v. Krakowski, 453 N.Y.S.2d 121 (1982) (holding that a pharmacist did have a duty to warn where the pharmacist had personal knowledge that the customer was an alcoholic and that the prescribed drug was contraindicated).

3. Pharmacies Do Not Owe a Duty to Monitor a Customer's Drug Usage

The Michigan Court of Appeals also held that a pharmacy owes no duty to monitor a customer's drug usage, or to discover the customer's addicted status. Furthermore, absent knowledge of a customer's addicted status, a pharmacy owes no duty to refuse to sell an addictive, non-prescription drug to that customer.

4. Where a Pharmacy Voluntarily Assumes a Duty, and Performs Such Duty Negligently, the Pharmacy is Liable for Injuries Arising Therefrom

After discussing situations where a pharmacy generally owes no duty to its customers, the Michigan Court of Appeals confronted Robin Baker's contention that Arbor Drugs voluntarily assumed a duty to the decedent because it implemented and used the Arbortech Plus drug interaction detection computer system. The court further observed that the law imposes duties upon defendants who voluntarily assume obligations that they were under no legal obligation to assume.

In evaluating whether Arbor Drugs voluntarily assumed the duty to its customers to detect and prevent harmful drug interactions, the court examined some of Arbor Drugs's commercials, advertising the Arbortech Plus system. The court specifically noted three examples of Arbor Drugs's advertisements for Arbortech Plus:

This prescription drug called Coumadin is an anticoagulant. And this is Micronase, a drug prescribed for diabetes. Both are quite effective. But it could be very dangerous if you were taking both at the same time. How can you avoid harmful drug interactions? Simple. Get your prescription filled at Arbor Drugs where Arbortech Plus provides your Arbor pharmacist with your complete medication history, so we're aware of any possible medication interactions. Arbortech Plus. You can't get any better.
This prescription drug called Dilantin is an anticonvulsant. And this is Tagamet, used for treating ulcers. Both are very effective, but there could be complications if you were taking both at the same time. How can you avoid unwanted drug interactions? Simple. Get your prescription filled at Arbor Drugs where Arbortech Plus provides your Arbor pharmacist with your complete medication history, so we’re aware of any possible medication interactions. Arbortech Plus. You can’t get any better.

Do you know what happens when you bring your prescription to Arbor Drugs? First, it’s checked for insurance coverage and screened for possible drug interactions and therapeutic duplication. That’s done very quickly by the Arbortech Plus computer. Then your prescription is filled and labelled. That’s done very carefully, by your Arbor pharmacist. The bottom line? Your prescription is not just filled quickly, it’s filled safely. Only at the Arbor Pharmacies. You can’t get any better.60

Based on this evidence, the court concluded that Arbor Drugs obviously designed and marketed its Arbortech Plus system to detect harmful drug interactions.61 The court concluded that Arbor Drugs voluntarily assumed a duty of care to its customers, like Roger Baker, when it implemented the Arbortech Plus system and then advertised that system as a means of detecting and warning against harmful drug interactions.62

IV. Future Implications of Baker

The Baker decision may have far-reaching implications in the future with respect to those pharmacies that assume similar duties to their customers. This is particularly true in the situation where a pharmacy advertises some form of drug interaction detection system. Under such circumstances, the pharmacy may face liability for all injuries proximately arising from the failure to reasonably perform such assumed duty.

Pharmacies should be aware of the current market trend in advertising and providing drug interaction detection systems. If such obligation is advertised, it must be carried out cautiously and competently. In Baker, one of the technicians apparently overrode the Arbortech Plus interaction system so that the pharmacist was able to fill a prescription that caused a drug interaction in the customer, resulting in a stroke. This illustrates the danger pharmacists encounter as “financial pressures . . . cause

60. Id.
61. Id. at 731.
62. Id.
them to work 12 hours a day with hardly a break to build higher volume and make up for lower prices. Meantime, pharmacists are supervising lesser trained technicians."63

Also a significant question remains about the efficacy of the computerized databases being used. One investigative report questioned "whether their databases are outdated, inaccurate or simply unheeded."64 Even when the computer provides accurate information to the pharmacist, it is still subject to human interpretation. Computer programs typically display differing levels of severity of drug interaction and provide instructions that may vary from patient to patient.65

V. ALTERNATIVE TREATMENT

Some courts have held that pharmacies and pharmacists have a duty to act with due care and diligence in compounding and selling prescription drugs and to refrain from negligently doing or failing to do an act which would injure a customer.66 For example, in Riff v. Morgan Pharmacy,67 the Pennsylvania Superior Court held that a pharmacist is a medical professional who, during the performance of professional duties, is held to a standard of care, skill, and intelligence that is uniform throughout the profession.68 Additionally, most courts accept that a pharmacist does not owe a duty to monitor, advise, or counsel a customer regarding a medication that the customer’s physician has prescribed, absent some irregularity on the face of the prescription.69 Pharmacists will, of course, be liable

63. Headden et al., supra note 1, at 49.
64. Id. at 51.
65. Id.
68. Id. at 1251.
for improperly filling a prescription. Furthermore, a pharmacist can be liable for refilling a prescription without proper authorization from the customer's physician.

At least two courts, other than the Baker court, have found that pharmacists or pharmacies may be held liable for failure to perform a voluntarily assumed duty with due care. In Ferguson v. Williams, the North Carolina Court of Appeals reversed a trial court's dismissal of a cause of action against a pharmacy and pharmacist finding that they had assumed a duty to the decedent. There, the plaintiff's husband had a prescription filled for Indocin. Prior to filling the prescription, the plaintiff's husband allegedly informed the pharmacist that he was allergic to aspirin, Percodan, and penicillin. The pharmacist allegedly advised plaintiff's husband that it was safe to take Indocin, even though the medical literature specified that the use of the drug Indocin is contraindicated in persons who suffer aspirin allergies or aspirin sensitivities. Plaintiff's husband consumed the Indocin, allegedly based on the pharmacist's assurances that it was okay to do so, and suffered an anaphylactic reaction resulting in his death.

Based on these allegations, the North Carolina appellate court concluded that the pharmacy and pharmacist had assumed a duty to plaintiff's decedent. The court noted "[w]hile a pharmacist has only a duty to act with due, ordinary care and diligence, this duty, like all others, expands and contracts with the circumstances." The pharmacist had voluntarily given advice, in addition to dispensing medication. Based on


72. Ferguson v. Williams, 374 S.E.2d 438 (N.C. Ct. App. 1988); see infra notes 73-81 and accompanying text; Frye v. Medicare-Glasser Corp., 605 N.E.2d 557 (Ill. 1992); see infra notes 82-92 and accompanying text.

73. Ferguson, 374 S.E.2d at 438.

74. Id. at 440.

75. Id. at 438.

76. Id. at 439.

77. Id.

78. Id.

79. Id. at 440.

80. Id.
these circumstances, the court concluded that "once a pharmacist is alerted to the specific facts and he or she undertakes to advise a customer, the pharmacist then has a duty to advise correctly."\(^{81}\)

In *Frye v. Medicare-Glasser Corp.*,\(^{82}\) the Illinois Supreme Court adopted a restricted approach to voluntarily assumed duty. The court concluded that a pharmacy and a pharmacist could be liable, under certain circumstances, for their failure to perform, with due care, an assumed duty.\(^{83}\) There, plaintiff's decedent died after simultaneously consuming alcohol and the prescription drug Fiorinal. The plaintiff alleged that the pharmacy and pharmacist assumed a duty to warn the customer of the possible side effects of alcohol when combined with Fiorinal by attaching a label to the prescription bottle with a picture of a drowsy eye and the words "May Cause Drowsiness."\(^{84}\) The evidence demonstrated that when the pharmacist utilized the pharmacy’s computer program, which suggests warning labels that might be provided about side effects of prescription drugs, she learned that Fiorinal can cause drowsiness, may intensify the effects of alcohol, and may impair one’s ability to drive.\(^{85}\)

The court rejected plaintiff’s argument that the pharmacist, by warning that Fiorinal may cause drowsiness, assumed the duty to warn of all possible side effects, including those associated with alcohol consumption.\(^{86}\) The court noted that although a pharmacist can assume a duty to warn of possible side effects of prescription drugs, that duty is limited to the extent of the pharmacist’s voluntary undertaking.\(^{87}\) Thus, the pharmacy and pharmacist were not liable under the circumstances presented to the court because they assumed only the duty to warn of the potential drowsiness side effect of Fiorinal.\(^{88}\) The pharmacist satisfied this duty, the court ruled, by placing an appropriate warning label on the prescription bottle.\(^{89}\)

The court supported its conclusion with public policy arguments. Observing that a contrary holding would discourage pharmacists from placing any warning labels on prescription containers, the court concluded

\(^{81}\) *Id.*


\(^{83}\) *Id.* at 560.

\(^{84}\) *Id.* at 558.

\(^{85}\) *Id.* at 559. The pharmacist testified that she did not utilize the alcohol warning label because that label had offended so many customers in the past. *Id.*

\(^{86}\) *Id.* at 560.

\(^{87}\) *Id.*

\(^{88}\) *Id.*

\(^{89}\) *Id.*
that imposing a broader duty could deprive the consuming public, as a whole, of any warnings which might be beneficial.\textsuperscript{90} The court further noted that a contrary holding would present practical difficulty.\textsuperscript{91} For example, additional warnings for Fiorinal, if a broader duty were imposed, would necessarily include all indications for the drug: "hypersensitivity to aspirin, caffeine or barbiturates; patients with porphyria; drug dependence; the effects of use with other central nervous system depressants; adverse effects during pregnancy; excess dosage; dizziness and light-headedness; and gastrointestinal disturbances such as nausea, vomiting and flatulence."\textsuperscript{92} Requiring a pharmacist to provide warning labels for each of these indications of Fiorinal, just as with any other drug with numerous indications, would be unworkable.

The courts in \textit{Baker}, \textit{Ferguson}, and \textit{Frye} will likely not be the last to find potential liability on the part of a pharmacy or pharmacist for failure to perform with due care a duty voluntarily assumed. However, as \textit{Frye} suggests, courts must carefully weigh competing public policy considerations in defining the limits of such liability.

\textbf{VI.} \textbf{Unanswered Concerns Following Baker}

Left unanswered by \textit{Baker} is the situation where a pharmacy simultaneously fills two potentially dangerously interactive prescriptions written by the same physician. Is the pharmacist required to warn the customer of the risk of interaction in such a circumstance? Could such a warning countermand a physician's intentionally prescribed treatment? Should a pharmacist be permitted to assume that a physician is aware of the potential risks of interaction and has made a medical judgment that such risks are justified?

Also left unanswered by \textit{Baker} is the situation where the customer purchases over-the-counter drugs at the same time a prescription is being filled. If the pharmacist knows of a possible drug interaction between the prescription drug and the over-the-counter drug, can the pharmacist be held liable for failing to warn the customer that consumption of both drugs simultaneously will result in a harmful interaction?

The questions raised are multitudinous. Should pharmacies be required to be linked to ascertain interactions between drugs dispensed by different outlets of the same chain of stores? And what liability should

\begin{itemize}
\item \textsuperscript{90} Id.
\item \textsuperscript{91} Id.
\item \textsuperscript{92} Id.
\end{itemize}
mail-order house pharmacies, which never have any face-to-face contact with the patients, incur?

Complicating the issue of warnings is the laissez faire attitude of most patients. A Columbus, Ohio, pharmacist told *U.S. News & World Report* that: “Even my wife throws (the written alerts) away.”93 If a proliferation of warnings results from the imposition of new legal duties on pharmacists, will patients truly be served? Or will they be numbed by the avalanche of unnecessary “cover yourself” warnings that such rulings would stimulate?

VII. CONCLUSION

Courts must carefully assess whether it is sound public policy to subject pharmacies and pharmacists to liability based on a broad interpretation of the concept of voluntary assumption of duty. There is great potential to work a disservice to the public. It is beneficial to have an extra check on the prescription drug filling process. Attempting to prevent harmful drug interactions should be the goal of all entities in the prescription drug distribution chain. An unrestricted application of the Baker holding, however, encourages pharmacies to sit back and do nothing to prevent harmful drug interactions, rather than risk tort liability under similar circumstances. Such an outcome does not serve the public. The constraint illustrated by the Frye approach is necessary to recognize the peculiarities of the patient/pharmacist relationship.

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93. Headden et al., *supra* note 1, at 49.
LEARNING DISABLED STUDENT ATHLETES: A SPORTING CHANCE UNDER THE ADA?

Katie M. Burroughs*

[Learning disabled students] are wired differently. If you are a teacher and are explaining a concept to a [learning disabled] student, you are communicating a message but the [learning disabled] student is wired in such a manner that he [or she] doesn't receive the same message you sent.¹

Learning deficiencies have been recognized as a disability for a little over three and one-half decades.² Moreover, learning disabilities are being diagnosed at a rate of 200,000 students per year.³

In the last decade, several learning disabled high school and college athletes have challenged the refusals by their schools to allow them to participate in competitive athletics based on their age or because established academic eligibility requirements were not met.⁴ These students have sought relief under one of two statutes: the Rehabilitation Act of 1973 ("Rehabilitation Act"),⁵ which prohibits discrimination against the disabled by agencies receiving federal financial assistance, or the Americans With Disabilities Act ("ADA"), which prohibits discrimination against the disabled in activities conducted by both public and private

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entities. Understanding the application of the ADA and the Rehabilitation Act to learning disabled student athletes is the first step toward assessing the viability of such lawsuits.

The issue of the eligibility of learning disabled students to participate in interscholastic and intercollegiate athletics arises in two distinct situations. First, students diagnosed as learning disabled often repeat one or more grades in elementary school. As a result, these students may begin their senior year of high school at age nineteen, as opposed to the average age of eighteen. Such a student is ineligible to compete in interscholastic activities because most school systems deny participation to high school students who turn nineteen before the start of the school year.

Second, special education courses offered at the high school level to accommodate learning disabled students, pursuant to federal legislation, often do not meet the National College Athletic Association ("NCAA") requirements for participation. Furthermore, these students may not qualify for athletic scholarships because special education courses are taught at a slower pace than mainstream classes. Such courses do not meet core eligibility requirements established by organizations such as the NCAA. Therefore, the NCAA may bar students enrolled in such courses from participating in NCAA-sanctioned, college-level athletic competitions.

This Article will focus on the application of the ADA to learning disabled student athletes denied participation in interscholastic or intercollegiate athletics. The question of whether a qualified student athlete with

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9. See Ganden v. National Collegiate Athletic Ass'n, No. 96-C6953, 1996 U.S. Dist. LEXIS 17368, at *22 (N.D. Ill. Nov. 21, 1996); see also Gary Reinmuth, Taking on the NCAA Gymnast Also Caught By Academic Rules, Chi. Trib., Jan. 28, 1996, at C22 (stating that Michelle Huston was ineligible to compete because of grades received before disability diagnosed and failure to meet core course requirements), Shelly Anderson, Edinboro Freshman Frustrated By NCAA Rules on Learning Disabled, Pittsburgh Post-Gazette, Nov. 17, 1996, at D-12 (stating that Shawn Farester does not meet NCAA core course requirement because he took a freshman English class for learning disabled students).
10. Tanya Bricking, Bright Futures Clouded; Special-Needs Stars Just Seek a Second Look, USA Today, Dec. 20, 1995, at 1C.
a learning disability has a statutory right under Title II\textsuperscript{12} or Title III\textsuperscript{13} of the ADA to participate on an interscholastic high school or intercollegiate athletic team will be explored. This Article argues that qualified student athletes with learning disabilities are covered by the ADA and do have a right to participate in athletics.

Part I of this Article examines the different learning disabilities that affect student athletes. Part II of this Article discusses the background and provisions of the ADA. Part III reviews the two lines of cases concerning eligibility, and Part IV analyzes the opposing viewpoints and assesses the weaknesses of the theory that these students do not qualify for protection under the ADA. Part V argues that the ADA applies to a high school athlete's challenge of the NCAA's qualifying criteria. Part VI provides a practitioner's guide to building a viable disability discrimination claim under the ADA, challenging the denial of participation in organized athletics for a student athlete. Finally, this Article discusses the public policy argument that the public interest in regulating interscholastic activities must yield to the public interest in prohibiting discrimination against those with disabilities. This Article concludes that, while Congress has provided a strong foundation in the area of disability law through the ADA, the Department of Justice\textsuperscript{14} needs to provide more direction by interpreting key statutory terminology to aid the courts in ensuring evenhanded treatment of the disabled.

I. UNDERSTANDING LEARNING DISABILITIES

A learning disability is a disorder that affects a person's ability either to decipher visual images and auditory sounds or to connect information from different parts of the brain.\textsuperscript{15} The limiting effects of a learning disability begin to emerge through a child's specific difficulties with spoken and written language, coordination, self-control, or attention.\textsuperscript{16} Learning disabilities encompass a wide range of developmental, cognitive, and behavioral problems, usually manifested in school-age children.\textsuperscript{17} A learning disability is often a lifelong condition that can affect a person's school

\textsuperscript{12} 42 U.S.C. §§ 12131–12165.
\textsuperscript{13} Id. at §§ 12181–12189.
\textsuperscript{14} Under the ADA, Congress granted the Department of Justice, through the Attorney General, the power to promulgate regulations implementing the ADA. See 42 U.S.C. § 12134(a)(Title II), § 12186(b)(Title III).
\textsuperscript{15} SHARYN NEUWIRTH, NATIONAL INSTITUTES OF HEALTH (1993).
\textsuperscript{16} Id.
\textsuperscript{17} ELIZABETH DANE, PAINFUL PASSAGES 27 (1990).
or work, daily routines, family life, friendship, and even play.\textsuperscript{18}

In 1967, the National Advisory Committee on Handicapped Children suggested a definition for "specific learning disability."\textsuperscript{19} This definition was later included in federal regulations\textsuperscript{20} promulgated pursuant to the Education for All Handicapped Children Act of 1975:\textsuperscript{21}

[T]hose children who have a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which disorder may manifest itself in imperfect ability to listen, think, speak, read, write, spell, or do mathematical calculations. Such disorders include such conditions as perceptual disabilities, brain injury, minimal brain dysfunction, dyslexia, and developmental aphasia. Such term does not include children who have learning problems which are primarily the result of visual, hearing, or motor disabilities, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.\textsuperscript{22}

This legal definition of "specific learning disabilities" remains in effect, despite a Fall 1987 report submitted to Congress by the United States Interagency Committee on Learning Disabilities,\textsuperscript{23} proposing a new uniform definition concerning learning disabilities.\textsuperscript{24}

The causes of learning disabilities are not known.\textsuperscript{25} Recent research shows that most learning disabilities do not stem from a single, specific area of the brain, but from difficulties in bringing together information

\textsuperscript{18} Id.


\textsuperscript{20} MARTHA HART-JOHNS & BRUCE JOHNS, GIVE YOUR CHILD A CHANCE 90 (1982).


\textsuperscript{23} Department of Health and Human Services, Public Health Services, Public Health Reports, March 1988 "Uniform Definition Proposed for Learning Disabled" (summarizing learning disabilities programs, proceedings of a National Conference on Learning Disabilities, and presentations at a public hearing held in the fall of 1986 and calls for related action).

\textsuperscript{24} In an effort to classify and clearly define learning disabilities, the proposed definition defined the term "learning disabled" as a "heterogeneous group of disorders 'presumed to be due to central nervous system dysfunction' and 'manifested by significant difficulties in the acquisition and use of listening, speaking, reading, writing, reasoning, or mathematical abilities, or of social skills.'" Id.

\textsuperscript{25} Id. at 10.
from various brain regions. Some scientists believe that the disturbances in brain structure and function begin before birth.

According to federal regulations, “learning disability” is a broad term with vague parameters, encompassing a variety of causes, symptoms, treatments, and outcomes. Despite this lack of clarity, three established categories of learning disabilities exist: (1) developmental speech and language disorders; (2) academic skills disorders; and, (3) “other,” a catch-all category including certain coordination disorders and learning handicaps not covered by the other terms. Each of these categories includes a number of specific learning disorders.

Developmental speech and language disorders reflect a difficulty in producing speech sounds, using spoken language to communicate, or understanding what other people say. The specific diagnosis may include a developmental articulation disorder, developmental expressive language disorder, or developmental receptive language disorder. Academic skills disorders result in a child being years behind his or her peers in developing reading, writing, and arithmetic skills. Here, the possible

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26. Id. Throughout pregnancy, the fetal brain develops into a complex organ made of billions of specialized cells called neurons. This brain development is vulnerable to disruptions and things can affect how the neurons form or interconnect. If the disruption occurs early, the fetus may die. If the disruption occurs later, when the cells are becoming specialized, it may leave errors in the cell makeup, location, or connections, which some scientists at the National Institute of Health believe may later show up as learning disabilities. Id. at 10-11.

27. Id. The leading theory on this subject posits that learning disabilities stem from subtle disturbances in brain structure and function caused by genetic factors; tobacco, alcohol, and other drug use; problems during pregnancy and delivery; and toxins in the child’s environment. Id.

28. DANE, supra note 17, at 4. This Article assumes the legal definition of “learning disabled” is the proper meaning of this term.


30. Id. at 5.

31. Id.

32. Id.

33. Id. “Children with this disorder may have trouble controlling their rate of speech.” Id.

34. NEUWIRTH, supra note 15, at 6. “Some children with language impairments can have difficulty expressing themselves in speech.” Id.

35. Id. Children with this disorder may have trouble understanding certain aspects of speech as if “their brains are set to a different frequency and the reception is poor.” Id.

36. Id.
diagnoses include developmental reading disorder (or dyslexia),\textsuperscript{37} developmental writing disorder,\textsuperscript{38} or developmental arithmetic disorder.\textsuperscript{39} “Other” learning disabilities include categories such as motor skills disorders and various developmental disorders that do not meet the criteria for a specific learning disability.\textsuperscript{40} This category includes coordination disorders that can lead to poor penmanship, as well as certain spelling and memory disorders.\textsuperscript{41}

Learning disabilities also affect a child’s or adult’s emotional and social development.\textsuperscript{42} Although all children experience successes and failures in academic and social situations,\textsuperscript{43} learning disabled children are more sensitive and aware of their differences from others.\textsuperscript{44} Children with learning disabilities assimilate what is said about them and “may define themselves in light of their disabilities, as ‘behind,’ ‘slow,’ or ‘different.’”\textsuperscript{45} To overcome these feelings of anxiety and low self-esteem resulting from negative feedback, the learning disabled child must be presented with structured experiences that provide a positive reality of success and accomplishment.\textsuperscript{46} Some researchers have suggested that learning disabled children benefit from participation in sports and extracurricular activities because it helps them to cope with threats to their self-esteem and anticipated loss of control that stems from the learning disability.\textsuperscript{47} According to these researchers, organized athletics can provide a structured environment in which the child can succeed.\textsuperscript{48} Moreover, the comprehensive physical education and recreational programming provided by team sports enhances the child’s development and provides important

\begin{footnotes}
\item[37.] Id. at 7. A person with a reading disorder may have trouble focusing on printed material, recognizing sounds, understanding words or grammar, building ideas, or even storing ideas in the memory. Id.
\item[38.] Id. at 6. A person with a developmental writing disorder may have problems interconnecting the brain functions dealing with vocabulary, grammar, hand movement, and memory. Id.
\item[39.] Id. at 8. A person with developmental arithmetic disorder may have problems recognizing numbers and symbols, memorizing facts, and understanding abstract concepts such as value and fractions. Id.
\item[40.] Id. at 8-9.
\item[41.] Id. at 9.
\item[42.] DANE, supra note 17, at 89.
\item[43.] Id.
\item[44.] Id. at 92.
\item[45.] NEUWIRTH, supra note 15, at 24.
\item[46.] DANE, supra note 17, at 102.
\item[47.] Id.
\item[48.] ERNEST SIEGEL & RUTH GOLD, EDUCATING THE LEARNING DISABLED 272 (1982) (“Feelings of productiveness and satisfaction are linked to the use of leisure time.”).
\end{footnotes}
skills, such as teamwork, which can be used and developed throughout
life.\textsuperscript{49} Furthermore, research has found that a significant relationship ex-
ists between physical well-being and receptiveness to classroom
learning.\textsuperscript{50}

II. \textbf{THE AMERICANS WITH DISABILITIES ACT}

President George Bush signed the ADA\textsuperscript{51} into law on July 26, 1990.\textsuperscript{52} The ADA provided for “a clear and comprehensive national mandate for
the elimination of discrimination against individuals with disabilities.”\textsuperscript{53} Forty-three million Americans have one or more physical or mental
disabilities.\textsuperscript{54}

The purpose of the ADA is to prohibit discrimination against the dis-
abled in a wide range of activities conducted by both public and private
entities.\textsuperscript{55} To accomplish the goals outlined by Congress, the ADA grants
comprehensive rights to disabled individuals in several areas including
employment,\textsuperscript{56} public accommodations,\textsuperscript{57} state and local government
services,\textsuperscript{58} and telecommunications.\textsuperscript{59}

\textbf{A. What Is Covered Under the ADA?}

The Rehabilitation Act prohibits discrimination against the disabled by
governmental agencies receiving federal financial assistance.\textsuperscript{60} The ADA

\begin{itemize}
  \item \textsuperscript{49} \textit{Id.} at 278.
  \item \textsuperscript{50} \textit{Id.} at 271.
  \item \textsuperscript{51} 42 U.S.C. §§ 12101-12213.
  \item \textsuperscript{52} \textit{Id.}
  \item \textsuperscript{53} \textit{Id.} at § 12101(b)(1).
  \item \textsuperscript{54} \textit{Id.} at § 12101(a)(1).
  \item \textsuperscript{55} Ronald D. Wenkart, \textit{The Americans With Disabilities Act and Its Impact on Public
  Education}, 82 EDUC. L. REP. 291, 292 (1993). Congress outlined the purpose of the Act as
  follows:
  \begin{enumerate}
    \item to provide a clear and comprehensive national mandate for the elimination of
discrimination against individuals with disabilities; (2) to provide consistent, enforceable
standards addressing discrimination; (3) to ensure that the federal gov-
ernment plays a central role in enforcing the standards established in the Act;
and, (4) to invoke the sweep of Congressional authority in order to address the
major areas of discrimination faced by the disabled.
  \end{enumerate}
  \item \textsuperscript{56} 42 U.S.C. §§ 12101(b)(1)-(b)(4).
  \item \textsuperscript{57} 42 U.S.C. §§ 12111-12117.
  \item \textsuperscript{58} \textit{Id.} at §§ 12181-12189.
  \item \textsuperscript{59} \textit{Id.} at §§ 12131-12134.
  \item \textsuperscript{59} Nondiscrimination on the Basis of Disability in State and Local Government Serv-
  \item \textsuperscript{60} Wenkart, \textit{supra} note 55, at 291.
\end{itemize}
prohibits discrimination in the previously unregulated private sector.\textsuperscript{61} The ADA further prohibits discrimination against the disabled in all elements of society, including private schools, universities, restaurants, transportation services, telecommunications services, private employers, and landlords.\textsuperscript{62}

1. \textit{Title II: Public Entities}

According to Title II of the ADA: “no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.”\textsuperscript{63} Title II of the ADA defines a “public entity” as “any State or local government,”\textsuperscript{64} or “any department, agency, special purpose district, or other instrumentality of a state or states or local government.”\textsuperscript{65} In contrast to the Rehabilitation Act that covers only those state and local government programs receiving federal financial assistance,\textsuperscript{66} the ADA covers programs, activities, and services of state and local government, regardless of whether the particular activity or program is federally funded.\textsuperscript{67} Courts have construed programs, like state athletic associations, as instrumentalities of the state, thus, a public entity under the ADA, because public schools delegate extensive authority to these athletic associations.\textsuperscript{68}

2. \textit{Title III: Public Accommodation Operated by Private Entities}

Title III of the ADA provides that “no individual shall be discriminated against on the basis of disability in the full and equal enjoyment of goods, services, facilities, privileges, advantages, or accommodations of any

\textsuperscript{61} Id.
\textsuperscript{62} 42 U.S.C. §§ 12101-12213.
\textsuperscript{63} Id. at § 12132.
\textsuperscript{64} Id. at § 12131(1)(A).
\textsuperscript{65} Id. at § 12131(1)(B).
place of public accommodation by any person who owns, leases (or leases to), or operates a place of public accommodation." The Department of Justice regulations implementing Title III of the ADA define "place of public accommodation" as a facility operated by a private entity whose operations affect commerce and come within at least one of twelve enumerated categories.

Both Title III of the ADA and the implementing regulations cover public accommodations operated by private entities. Thus, Title III of the ADA protects the disabled from unequal enjoyment of "places of public accommodation" operated by a private entity. Public accommodations include private universities, colleges, and other places of education. One court has concluded that the NCAA falls within the ambit of Title III of the ADA because it is a private entity operating in a place of public accommodation.

3. Application of the ADA to High Schools, Universities, and State and National Athletic Organizations

To establish coverage under Title II of the ADA, an individual must show (1) the organization accused of discrimination is a "public entity;" (2) he is a "qualified individual with a disability;" and, (3) he has been excluded from participation or denied the benefits of the public entity's activities.

To establish a prima facie case under Title III, a student athlete must show (1) he is disabled; (2) the organization is a "private entity" that

70. 28 C.F.R. § 35.104 (1993). The numerous categories listed include public places, such as a place of recreation or exercise, gymnasium, secondary school, and undergraduate school. Id.
71. 42 U.S.C. § 12181(6) (defining a private entity as any entity other than a public entity, which is defined in section 12131(1) of this Title). The United States Supreme Court found the National Collegiate Athletic Association ("NCAA") to be a private entity. National Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).
73. Ganden v. National Collegiate Athletic Ass'n, No. 96-C6953, 1996 U.S. Dist. LEXIS 17368, at *34 (N.D. Ill. Nov. 21, 1996). The court in Ganden found that the NCAA has a close connection with the public accommodations of its member institutions. Furthermore, the court thought it was probable that the NCAA operates these athletic facilities by controlling the competitions at such facilities. Id. (relying on Welsh v. Boy Scouts of Am., 93 F.2d 1267, 1270 (7th Cir. 1993) which found that a member organization could be a "place of public accommodation" if there is a close connection between the organization's purpose and the facility).
operates a "place of public accommodation;" and, (3) he was denied the opportunity to "participate in or benefit from services or accommodations on the basis of his disability," and that reasonable accommodations could be made which do not fundamentally alter the nature of the organization.75

The recurring issue concerning learning disabled students under the ADA is whether the "otherwise qualified" element, as supplemented by the "reasonable accommodation" requirement, is met. These elements are part of both Title II and Title III claims under the ADA.76

B. Defining Disability

Congress intended Title II of the ADA to be interpreted consistently with prior interpretations of section 504 of the Rehabilitation Act.77 Much of the ADA's language is identical to that of the Rehabilitation Act because Congress intended to extend the application of the Rehabilitation Act to entities that do not receive federal financial assistance.78 In fact, the legislative history of the ADA explicitly directs courts to use case law decided under the Rehabilitation Act for interpretative guidance.79 Thus, a legal analysis of cases brought under the ADA parallels an analysis under section 504 of the Rehabilitation Act, and is helpful in discerning the intent of the underlying language of the ADA.80

1. The Rehabilitation Act of 1973

Section 504 of the Rehabilitation Act provides in pertinent part:

No otherwise qualified individual with handicaps in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimina-

76. See id. (Title III); Pottgen, 857 F. Supp. at 662-63 (Title II).
80. Id.
tion under any program or activity receiving Federal financial assistance.\textsuperscript{81}

Regulations promulgated under the Rehabilitation Act by the Department of Education\textsuperscript{82} and the Department of Health and Human Services\textsuperscript{83} prohibit colleges and high schools from discriminating against qualified handicapped athletes.\textsuperscript{84} The regulations provide that qualified handicapped athletes must be given "an equal opportunity for participation" in interscholastic and intercollegiate activities.\textsuperscript{85} To prevail under the Rehabilitation Act, a learning disabled athlete must show that (1) he is handicapped within the meaning of the Rehabilitation Act;\textsuperscript{86} (2) he is "otherwise qualified" for the services sought; (3) he was excluded from the services sought "solely by reason of his handicap;" and, (4) the program in question receives federal financial assistance.\textsuperscript{87}

2. Disability Under the ADA

A "disability" under the ADA, as well as under the Rehabilitation Act, is "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."\textsuperscript{88} The Report of the Senate Committee on Labor and Human Resources notes that this language is comparable to the regulatory definitions promulgated pursuant to section 504 of the Rehabilitation Act.\textsuperscript{89} While many disabilities are included within the ADA's definition of "disability," this Article focuses on the first definition of disability—physical or mental impairment—which includes learning disabilities within its parameters.\textsuperscript{90}

Under the implementing regulations of the ADA, "physical or mental impairment" means "(B) any psychological disorder or condition . . . .

\textsuperscript{81} 29 U.S.C. § 794(a) (1994).
\textsuperscript{82} 34 C.F.R. § 104.37(c), § 104.47(a) (1992); see also Mitten, infra note 84, at 1008.
\textsuperscript{83} 45 C.F.R. § 84.37(c), § 84.47(a)(1992); see also Mitten, infra note 84, at 1008.
\textsuperscript{85} Id.
\textsuperscript{86} Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(p)(32)(A),(B), 106 Stat. 4344 (1992) (demonstrating that in 1992, the term "disability" was substituted for "handicap").
\textsuperscript{87} Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 582 (M.D. Fla. 1995), vacated, 102 F.3d 1172 (11th Cir. 1997), appeal after remand, 103 F.3d 720 (1997).
\textsuperscript{90} 42 U.S.C. § 12102(2).
such as . . . specific learning disabilities." A physical or mental impairment, though, is not a protected disability under the ADA unless the disability substantially limits a major life activity. "Substantially limits" generally means unable to perform a major life activity that the average person in the general population can perform, or significantly restricted as to condition, manner, or duration of such performance compared to a member of the general population. Major life activities include, among other things, "learning." Thus, an individual diagnosed with a specific learning disability is "disabled" within the meaning of the ADA because a diagnosed learning disability limits one's ability to learn.

3. Qualified Individual With a Disability

The ADA, unlike the Rehabilitation Act, defines "qualified individual with a disability" as:

[A]n individual with a disability who, with or without reasonable modifications to rules, policies, or practices, the removal of architectural, communication or transportation barriers, or the provisions of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

The definition embodies the interpretations reached by courts in their struggle to define "otherwise qualified individual" under the Rehabilitation Act. Thus, courts interpreting the term "qualified individual with a disability" under the ADA use an analysis similar to the analysis adopted by courts under the Rehabilitation Act.

Interpreting the Rehabilitation Act, the United States Supreme Court, in its first case dealing with the application of the term "qualified individ-
ual," held in *Southeastern Community College v. Davis*, that an institution is not required to lower or modify standards to accommodate a disabled person. The Court concluded that an "otherwise qualified person" is "one who is able to meet all of the program's requirements in spite of his [disability]."

The Court further explained its holding in *Davis* in *Alexander v. Choate*:

*Davis* . . . struck a balance between the statutory rights of the handicapped to be integrated into society and the legitimate interests of federal grantees in preserving the integrity of their programs: while a grantee need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones.

Thus, *Alexander* required institutions to show that a reasonable accommodation was not available that would permit a disabled individual to participate. The Court found that an accommodation was not reasonable if it imposed "undue financial and administrative burdens," or "fundamentally alter[ed] the nature of the service, program or activity." Therefore, by combining the holdings in *Davis* and *Alexander*, a "qualified individual" became one who could participate in a program or activity if the institution could implement a "reasonable modification."

To determine if a disabled individual under the ADA is "a qualified individual," courts must first determine what the necessary eligibility requirements are for the activity in which the individual wants to participate. Next, the court must make a factual determination as to whether

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100. *Southeastern Community College v. Davis*, 442 U.S. at 397. Davis could not understand speech except through lip reading. A community college rejected her application to the nursing program because it believed Davis' hearing disability would not allow her to safely participate in the program and to safely care for patients. *Id.* at 407.
101. *Id.* at 405.
102. *Id.* at 407 (finding that legitimate physical qualifications, such as the ability to understand speech without reliance on lip reading, may be essential to participation in clinical program for patient safety).
104. *Id.* at 300.
105. Edwards, *supra* note 77, at 227. *But see Davis*, 442 U.S. at 412. Under *Davis*, the university was not required to determine if a reasonable accommodation would allow the hearing impaired student to participate, but only to show a rational basis for denying admission. *Id.*
106. *Davis*, 442 U.S. at 412.
109. *Id.*
the individual meets these requirements.\textsuperscript{110} If the individual does not meet the necessary requirements, the court must next determine whether a "reasonable accommodation" exists that would allow the individual to successfully participate in the activity.\textsuperscript{111}

III. JUDICIAL VIEWS ON ATHLETIC PARTICIPATION BY THE LEARNING DISABLED STUDENT UNDER THE ADA

The central issue in lawsuits brought by learning disabled student athletes seeking to compete in competitive sports is whether the student athlete is a qualified individual with a disability who has been discriminated against by reason of such disability.\textsuperscript{112} One line of cases holds that student athletes with learning disabilities are not qualified individuals under the ADA because no "reasonable accommodations" are available. The other line of cases holds that student athletes are qualified under the ADA, and thus are able to participate in high school athletics.

A. Sandison v. Michigan High School Athletic Association

The leading case holding that learning disabled athletes are not to be excluded solely by reason of their disability, and that waiving eligibility requirements is not a reasonable modification under the ADA, is \textit{Sandison v. Michigan High School Athletic Association.}\textsuperscript{113} Ronald Sandison and Craig Stanley sought a preliminary injunction\textsuperscript{114} against the Michigan High School Athletic Association ("MHSAA").\textsuperscript{115} The purpose of the injunction was to prevent the MHSAA from prohibiting Sandison and Stanley from running on the cross-country and track teams and to preclude the MHSAA from penalizing the high schools for permitting the two students to participate.\textsuperscript{116} The United States District Court for the Eastern District of Michigan granted the injunction, allowing the plaintiffs to compete on the teams despite their ineligibility based on the

\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.}
\textsuperscript{112} Mitten, \textit{supra note 84}, at 1010-11.
\textsuperscript{114} \textit{Id.} The court considered four factors in determining whether the district court abused its discretion in issuing the preliminary injunction: "(1) 'strong' likelihood of success on the merits; (2) if student would otherwise suffer irreparable injury; (3) if injunction would cause substantial harm to others; and, (4) whether public interest would be served." \textit{Id.} at 1030.
\textsuperscript{115} \textit{Id.} at 1028.
\textsuperscript{116} \textit{Id.} at 1029.
MHSAA’s nineteen-year age limitation. The United States Court of Appeals for the Sixth Circuit, however, dismissed as moot the MHSAA’s challenge to the preliminary injunction, and reversed the portion of the injunction that ordered the MHSAA to refrain from penalizing the high schools.

Both Sandison and Stanley were high school athletes who were held back early in their educational training because of learning disabilities. Sandison began first grade two years late. Four years later, at age eleven, doctors diagnosed Sandison with an auditory input disability. With special education support, Sandison did not experience any further delay in his education. He participated on the high school cross-country and track teams during the first three years of high school. In May of 1994, three months before he was to begin his senior year, Sandison turned nineteen.

Craig Stanley was diagnosed early in his educational career with a learning disability in mathematics. Due to his learning disability, Stanley repeated kindergarten and spent five years in a special education classroom. Stanley then entered a regular classroom in the fourth, rather than the fifth, grade. Like Sandison, Stanley also competed on the cross-country and track teams during his first three years of high school. Prior to beginning his senior year, Stanley turned nineteen.

The MHSAA oversees interscholastic athletic events. Most high schools in Michigan are members of the organization and adopt MHSAA’s rules governing interscholastic sports. MHSAA regulations prohibit student athletes over nineteen years of age, without exception,

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119. Id. Sandison had a processing speech and language disorder which caused him to delay beginning first grade for two years. Stanley had a learning disability in mathematics.
120. Id. Stanley had a processing speech and language disorder which caused him to delay beginning first grade for two years. Sandison, 863 F. Supp. at 484-85.
121. Id. An auditory input disability hinders one’s ability to distinguish between sounds. Id.
122. Id.
123. Id.
124. Id.
125. MHSAA HANDBOOK 1996-97 12 (1996). During the Sandison case, the 1995-96 edition of the handbook was in effect. However, all applicable provisions were not amended in the 1996-97 edition. Those provisions that were modified are noted in shaded gray in the text of the handbook.
126. Id. at 13.
from participating in interscholastic sports.\textsuperscript{127}

Sandison and Stanley argued that their exclusion from interscholastic
sports constituted unlawful discrimination because of their learning disa-
bilities, and violated both the Rehabilitation Act and the ADA.\textsuperscript{128} The
United States Court of Appeals for the Sixth Circuit ruled in favor of the
MHSAA.\textsuperscript{129} Reversing the second portion of the preliminary injunction,
which barred the MHSAA from penalizing the high schools because an
ineligible player competed on a high school team, the court determined
that the plaintiffs were unlikely to succeed on the merits of their Rehabil-
itation Act and ADA claims.

According to the court of appeals, the primary issues were whether the
student athletes with learning disabilities were excluded by reason of
their disability, and whether a waiver of the age requirement was a rea-
sonable modification.\textsuperscript{130} The court examined plaintiffs' claims under the
Rehabilitation Act and the ADA, reaching the same result under both
statutes.\textsuperscript{131} First, the court held that the plaintiffs were not excluded from
participation in high school interscholastic athletics "solely by reason of"
their learning disability.\textsuperscript{132} Rather, the court found that absent their re-
spective learning disability, Sandison and Stanley failed to satisfy the
MHSAA age requirement.\textsuperscript{133} Thus, the court concluded that the boys
did not meet the age requirement because of their birth dates, not be-
cause of their learning disability.\textsuperscript{134}

Next, the court held that the student athletes were not "otherwise qual-
ified" to participate in interscholastic cross-country and track competi-
tions.\textsuperscript{135} Initially, the court found that the age limitation imposed by the

\textsuperscript{127} Id. (stating "[a] student who competes in any interscholastic athletic contest must be under nineteen (19) years of age, except that a student whose nineteenth (19th) birthday occurs on or after September 1 of a current school year is eligible for the balance of that school year.").

\textsuperscript{128} Sandison, 64 F.3d at 1028.

\textsuperscript{129} Id. at 1036.

\textsuperscript{130} Id. at 1031, 1034.

\textsuperscript{131} Id. at 1030, 1036-37.

\textsuperscript{132} Id. at 1036; see also Cavallaro v. Ambuck, 575 F. Supp. 171 (W.D.N.Y. 1983) (con-
cluding under the Rehabilitation Act that student was not "otherwise qualified" because
19-year age limitation had no relation to his disability).

\textsuperscript{133} Sandison, 64 F.3d at 1034.

\textsuperscript{134} Id. See also Reaves v. Mills, 904 F. Supp. 120 (W.D.N.Y. 1995) (finding New York
state regulation prohibiting participation in high school athletics if a student turned 19
before September first was based on age, and therefore applied uniformly to mildly men-
tally retarded high school student who had repeated the first grade).

\textsuperscript{135} Sandison, 64 F.3d at 1034.
MHSAA was a “necessary requirement of the program.” Adopting the conclusion of the district court, the court of appeals found that the age restriction prevents injury to other players and eliminates unfair competitive advantages that older and larger participants might provide; therefore, it was essential in maintaining the amateur character of the athletic program.

Relying on the record compiled by the trial court below, the court found that “older students are generally more physically mature than younger students.” The court, however, found that the district court erred, finding that a waiver constituted a reasonable accommodation. First, the court stated that expanding the permissible age range for participation would fundamentally alter the nature of the interscholastic athletic program. The court asserted that by disregarding the age restriction, more physically mature students would be permitted to participate in athletics, thereby changing the nature of high school athletics.

Second, the court found that making a competitive fairness determination of each athlete requesting a waiver would place an “undue burden” on MHSAA. MHSAA asserted that there are five factors to weigh in deciding if an athlete had an unfair competitive advantage: chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy. MHSAA would have to require high school coaches and physicians hired by MHSAA to make eligibility determinations. The court found that balancing these factors in relation to opposing teams, team members, and the team unit was nearly impossible; thus, it was unreasonable to call upon coaches and physicians for this purpose.

Finally, the Sixth Circuit found that while participating in athletics helped the students progress through school, the waiver of the age restriction would not help these students overcome their learning disabili-

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136. Id. at 1037. Certain eligibility requirements are essential by nature. Pottgen v. Missouri State High Sch. Activities Ass’n, 40 F.3d 926, 930-31 (8th Cir. 1994), rev’g, 857 F. Supp. 654 (E.D. Mo. 1994).
137. Sandison, 64 F.3d at 1035.
138. Id.
139. Id.
140. Id.
141. Id.
142. See id. at 1027 (expert testimony of MHSAA).
143. Id.
144. Id. at 1035.
ties. A waiver "merely remove[d] the age ceiling as an obstacle," but did not alter the fact that the students have a learning disability. Thus, the court concluded that a waiver of the age restriction was not a "reasonable accommodation." In making its determination in Sandison, the United States Court of Appeals for the Sixth Circuit adopted the two-step analysis of the United States Court of Appeals for the Eighth Circuit in Pottgen v. Missouri State High School Activities Association. The Sixth Circuit first determined that the age requirement was essential for safety reasons. Then, it conducted an individualized inquiry to see if Stanley or Sandison satisfied the age requirement with or without reasonable accommodation. According to the court, a waiver of the age requirement for learning disabled athletes could not be reasonable. Therefore, the student athletes could not be considered "otherwise qualified" and were not covered by the Rehabilitation Act or the ADA.

B. Johnson v. Florida High School Activities Association

In Johnson v. Florida High School Activities Association, the United States District Court for the Middle District of Florida held that a waiver of the less than nineteen years of age eligibility requirement to participate in high school athletics was a reasonable modification under the ADA. Dennis Johnson, a high school senior diagnosed with a learning disability, sought an injunction against the Florida High School Athletic Association ("FHSAA"). The FHSAA found Johnson ineligible to participate on both the high school football and wrestling teams because he was nineteen years of age. Relying on the decision of the district court in Sandison, the Johnson court granted an injunction, enjoining the

145. Id. (stating an accommodation operates to overcome the disability so that it no longer prevents the individual from participating).
146. Id.
147. Id.
148. Pottgen v. Missouri State High School Activities Association, 40 F.3d at 930-31 (applying a two-step analysis to determine, first, whether the eligibility requirements were essential and, then, whether Pottgen met those requirements with or without reasonable modification).
149. Sandison, 64 F.3d at 1035.
150. Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 580 (M.D. Fla. 1995), vacated, 102 F.3d 1172 (11th Cir. 1995), appeal after remand, 103 F.3d 720 (1997). This Article analyzes the reasoning behind the district court decision as a model for courts finding disabled student athletes eligible for participation under the ADA.
151. Id.
152. Id. at 581, 582.
FHSAA from enforcing its rules prohibiting Johnson from playing interscholastic athletics and penalizing the high school for allowing Johnson to play.\textsuperscript{153}

Because of a hearing impediment, Johnson began kindergarten a year late.\textsuperscript{154} He was held back a second time in first grade because of his inadequate reading and language skills.\textsuperscript{155} Johnson played football and wrestled for the first three years of high school.\textsuperscript{156} However, he turned nineteen two months before he was to begin his senior year.\textsuperscript{157} According to the FHSAA, Johnson could not participate in interscholastic sports because he turned nineteen before the school year started.\textsuperscript{158} The FHSAA denied Johnson's request for a "hardship" exception because the FHSAA committee lacked the authority under its bylaws to "waive the age eligibility rule."\textsuperscript{159} Under FHSAA rules, the age eligibility requirement cannot be waived because it is considered an essential eligibility requirement by FHSAA.\textsuperscript{160}

After first determining that the FHSAA was a public entity,\textsuperscript{161} the district court determined that Johnson was a "qualified individual with a disability" under both the Rehabilitation Act and the ADA.\textsuperscript{162} Next, the district court assessed whether the age requirement was an essential eligibility requirement. According to the court, the purposes of the FHSAA's age requirement were (1) to promote safety; and (2) to create an even, fair playing field, preventing schools from "red shirting"\textsuperscript{163} their players

\textsuperscript{153} Id. at 587.
\textsuperscript{154} Id. at 581.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 582.
\textsuperscript{157} Id.
\textsuperscript{158} FLORIDA HIGH SCH. ACTIVITIES ASS'N, OFFICIAL HANDBOOK OF THE FHSAA, § 19.4.1, at 31 (1995) [hereinafter Handbook of the FHSAA].
\textsuperscript{159} Id. at § 20.1.1, at 40 (giving Executive Committee authority to set aside the effect of any eligibility requirement except the age limit, when, in its opinion, the rule works a hardship upon the individual student).
\textsuperscript{160} Id.
\textsuperscript{161} The court found that the FHSAA is an "instrumentality of the state" because it acts as a regulatory arm of Florida high schools in controlling all aspects of interscholastic activities in both private and public high schools. Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 583 (M.D. Fla. 1995), vacated, 102 F.3d 1172 (11th Cir. 1997), appeal after remand, 103 F.3d 720 (1997). Because the court determined that the FHSAA is a public entity, it conducted an analysis under Title II of the ADA. See supra notes 66-72 and accompanying text.
\textsuperscript{162} Johnson, 899 F. Supp. at 583, 586 (finding that this is the only issue in contention besides coverage under the ADA).
\textsuperscript{163} Douglas S. Looney, This Year You're Going to See Red, SPORTS ILLUSTRATED, Sept. 1, 1982, at 20. "Red shirting" is the practice of holding a player out of competition
to build a better program. Adopting the reasoning of the district court's remand decision in Sandison and the dissent in Pottgen, the Johnson court found that "the relationship between the age requirement and its purposes must be such that waiving the age requirement in the instant case would necessarily undermine the purposes of the requirement." The court rejected the argument that because the FHSAA deems the age requirement essential, it is in fact essential. Relying on the dissent in Pottgen, the court stated that "if a rule can be modified without doing violence to its essential purposes . . . it 'cannot' be essential to the nature of the program or activity."168

Because he was not the largest football team member playing his position, he did not present any danger to other players. The court noted that Johnson was a mid-level football player, and no more experienced than other players because he only played organized sports for three years. Furthermore, the court found that weight divisions in wrestling eliminated any safety concerns. Thus, the court concluded that Johnson's participation on the field did not undermine the purposes of safety and fairness of the FHSAA regulations. However, the court stressed that its holding was individualized and limited to the facts of Johnson's case. Therefore, the court held the essential purposes of the age requirement were not undermined by allowing Johnson to participate on the team.

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164. Id.
168. Id. at 585 (quoting Pottgen v. Missouri State High Sch. Activities Ass'n, 40 F.3d 926, 932-33 n.7 (8th Cir. 1994)).
169. See id.
170. See id.
172. See Johnson, 899 F. Supp. at 585.
173. Id.
IV. PROBLEMS WITH THE OPPOSING VIEWS

The Johnson case, and other district court decisions\(^\text{174}\) granting similar injunctions, present an individualized analysis of each learning disabled student’s circumstances in accordance with the ADA and its implementing regulations. The opposing analysis set forth in Sandison, however, lacks legislative and judicial support. Courts recognizing a cause of action by learning disabled student athletes under the ADA offer three different reasons to support the proposition that student athletes with learning disabilities are protected under the ADA. First, learning disabled student athletes who are prohibited from participation in athletics are being excluded “by reason of such disability.”\(^\text{175}\) Second, the essential eligibility requirements established by such organizations should be reviewed on an individualized, case-by-case basis by the courts to determine if the student athlete is otherwise qualified.\(^\text{176}\) Third, reasonable accommodations, which do not alter the nature of the program or pose an undue burden, must be provided by the organization.\(^\text{177}\) If the organization asserts reasonable accommodations are not possible, substantial justification must be shown.\(^\text{178}\) Each of these rationales will be examined in turn.

A. Excluded “By Reason of Such Disability”

Title II of the ADA provides that “no qualified individual with a disability shall, by reason of such disability, be excluded from participation.”\(^\text{179}\) The Sandison court first addressed the “by reason of such disability” element, holding that the student athletes were not excluded from participation by reason of their disability, but rather by reason of their age.\(^\text{180}\) The Sixth Circuit determined that the MHSAA eligibility rule was neutral with respect to disability because it did not bar the stu-


\(^{176}\) Johnson, 899 F. Supp. at 586.

\(^{177}\) Id. at 584.


dent athlete from participation due to a learning disability.\textsuperscript{181} In fact, the students could participate during their first three years of high school.\textsuperscript{182} The Johnson court, on the other hand, did not address this element in its ADA analysis.\textsuperscript{183}

The Sandison opinion, however, did not recognize that Stanley and Sandison began their senior year of high school late as a direct result of a learning disability.\textsuperscript{184} But for the students' learning disabilities, the student athletes would have graduated high school before turning nineteen years of age.\textsuperscript{185} Thus, the holding of Sandison effectively insulates organizations and programs from scrutiny by applying a narrow interpretation of the phrase "by reason of such disability," contrary to the stated purposes of the ADA.\textsuperscript{186}

\section*{B. Qualified Individual With a Disability: Meeting the "Essential Eligibility Requirements"}

A qualified individual is one who meets the eligibility requirements of an organization with or without reasonable modification.\textsuperscript{187} Under this step in the analysis, the court must determine what the essential eligibility requirements are, and whether the disabled individual is able to meet

\textsuperscript{181} Id. at 1032.
\textsuperscript{182} Id.
\textsuperscript{183} Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 583 (M.D. Fla. 1995), vacated, 102 F.3d 1172 (11th Cir. 1997), appeal after remand, 103 F.3d 720 (1997).
\textsuperscript{184} Id. The court reasoned that, absent their respective learning disabilities, the students could not satisfy the eligibility requirement. Id. In reaching this conclusion, the court relied on case law in which the plaintiff suffered from a physical disability that prevented the plaintiff from participating in a program or job. See Doherty v. Southern Coll. of Optometry, 862 F.2d 570, 573 (6th Cir. 1988) (finding plaintiff could use optometry instruments and meet requirements of program absent plaintiff suffering from retinitis pigmentosa that restricted the field of vision, and an associated neurological condition that affected plaintiff's motor skills) (emphasis added), Tuck v. HCA Health Serv. of Tennessee, Inc., 7 F.3d 465, 473-74 (6th Cir. 1993) (holding that plaintiff could meet lifting requirement of job absent his disability).
\textsuperscript{185} See Booth v. University Interscholastic League, No. A-90-CA-764, 1990 U.S. Dist. LEXIS 20835 (W.D. Tex. Oct. 4, 1990) (rejecting an argument similar to the one raised in Sandison, the court noted that, "[t]o accept such an analysis would mean that any student who fails to meet [defendant's] requirement as a result of a past handicap is not 'otherwise qualified,' and therefore is not protected by the Rehabilitation Act.").
\textsuperscript{186} Alexander v. Choate, 469 U.S. 287, 295-96 (1985). Congress, from the time it implemented the Rehabilitation Act of 1973, has perceived that discrimination against the handicapped was most often not the product of invidious animus in erecting neutral barriers, but rather of thoughtlessness and indifference. Id.
such requirements. In both Sandison and Johnson, the MHSAA and FH-SAA, respectively, require student athletes to be no more than eighteen at the start of senior year to promote safety and to create an even playing field.\footnote{188}

Neither the ADA nor its implementing regulations, however, define what "essential eligibility requirements" are, nor do they provide guidance as to what constitutes evidence of such requirements.\footnote{189} The Department of Justice declined to provide a definition of "essential eligibility requirements" because of the variety of situations in which an individual's qualifications could be at issue.\footnote{190} The regulations cite Nassau County School Board v. Arline\footnote{191} in support of the proposition that the court must perform an individualized inquiry to determine whether an athlete meets the proposed criteria.\footnote{192}

In Arline, a teacher suffering from recurring tuberculosis brought a claim stating that the school board's decision to dismiss her violated the Rehabilitation Act.\footnote{193} The United States Supreme Court noted that an individualized inquiry was necessary to give effect to the goals of the Rehabilitation Act.\footnote{194} To answer whether Arline, under the Act, was otherwise qualified for the job of teacher, the Court found that most courts would have to conduct an individualized inquiry and make appropriate findings of fact.\footnote{195} The Court determined that this inquiry was necessary under the Rehabilitation Act to protect the disabled against deprivation of benefits based on prejudice, stereotypes, or unfounded fear, while at the same time balancing the legitimate concerns of the organization.\footnote{196}

The ADA's implementing regulations do provide some guidance where questions of safety are involved. A public entity is not required to permit an individual to participate if "that individual poses a direct threat to the

\footnotesize{188. Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1035 (6th Cir. 1995); Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 584 (M.D. Fla. 1995), vacated, 102 F.3d 1172 (11th Cir. 1997), appeal after remand, 103 F.3d 720 (1997).
189. Coleman & Debruge, \textit{supra} note 67, at 64.
190. Nondiscrimination on the Basis of Disability in State and Local Government Services, 56 Fed. Reg. 35,694, 35,700-01 (1991); \textit{but see} 28 C.F.R. § 35.104 (1993). "Because of the variety of situations in which an individual's qualifications will be at issue, it is not possible to include more specific criteria in the definition." \textit{Id.}
193. \textit{Arline}, 480 U.S. at 276.
194. \textit{Id.} at 287.
195. \textit{Id.}
196. \textit{Id.}
health or safety of others." The Department of Justice's comments concerning the regulations promulgated under the ADA specifically state that any determination of direct threat to safety may not be based on generalizations or stereotypes, but must be based on an individualized assessment. Additionally, the ADA prohibits the use of eligibility criteria that "screen out or tend to screen out ... any class of individuals with disabilities from fully enjoying any service, program, or activity, unless such criteria can be shown to be necessary for the provision of the service, program, or activity being offered." Therefore, under the ADA it is discriminatory to impose criteria that, while not creating a direct bar to students with learning disabilities, indirectly prevent or limit their ability to participate unless the organization can demonstrate that these criteria are necessary. Thus, to ensure the criteria applied by an organization do not unfairly impact upon a student athlete with a learning disability, an individualized inquiry is not only necessary, but required where the criteria concern safety.

Contrary to Sandison, where the court found the eligibility requirement essential because the athletic organization deemed it essential, the Johnson court analyzed the application of the age requirement to each student. First, the court found that the age requirement could not be essential to the promotion of safety and fair competition where safety and fairness issues were not presented by the particular student athlete. Furthermore, the age requirement "tends to screen [learning disabled students] out" of interscholastic athletics for all four years of high school.

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200. Id. See Howard v. Department of Social Welfare, 655 A.2d 1102 (Vt. 1994) (holding that the limitations of Aid to Needy Families with Children provide benefits to children under the age of eighteen, or to children expected to graduate from high school by age nineteen, is not fundamental to the nature of the benefit program, which is to support needy children, and that the limit discriminates against the class of learning disabled students who have to repeat at least one year of school because of their disability); but cf. Aughe v. Shalala, 885 F. Supp. 1428 (W.D. Wash. 1995).
201. Edwards, supra note 77, at 235-36.
203. Id. at 585.
In each case, because of a learning disability, the athletes were delayed or held back in school, thereby reaching their senior year of high school at age nineteen. As the Johnson court points out, the ADA requires a determination to be made on the basis of a specific factual situation to ensure evenhanded treatment. Such was not done by the Sandison court.

C. Qualified Individual With a Disability: “Reasonable Modification”

Even if a court determines that the requirement imposed is an essential eligibility requirement, based on the legitimate reasons of the organization, the court must nevertheless consider whether the nonqualifying disabled individual may become qualified with reasonable modifications to the program. Thus, the issue becomes whether waiving the age requirement “fundamentally alters the nature of the . . . program.”

Under the Rehabilitation Act, the United States Supreme Court held that reasonable accommodations do not fundamentally or substantially alter the nature of the program. Furthermore, the Court held that a reasonable modification cannot impose “undue financial or administrative burdens.” Following these decisions, a number of federal agencies promulgated regulations defining reasonable accommodation that were later incorporated into the ADA. Unfortunately, the ADA only defines reasonable accommodation in the employment context, not in the context of private and public entities. The lack of statutory or regulatory guidance forces courts to continue to define reasonable accommodation under the same standards and principles set forth in cases under the Rehabilitation Act. Thus, in accordance with the Rehabilitation Act, reasonable modifications are defined under the ADA on a case-by-case basis.

Based on the facts of both Sandison and Johnson, a waiver of the age

204. See supra notes 201-02 and accompanying text.
206. Id.
207. 28 C.F.R. § 35.130(b)(7) (1993).
212. Wenkart, supra note 55, at 300.
213. Dawn V. Martin, Symposium: The Americans With Disabilities Act—Introductory Comments, 8 J.L. & HEALTH 1, 7 (1993-94) (for example, an accommodation which constitutes undue hardship for one, may be easily accomplished by another).
requirement by the athletic association is a reasonable modification that
neither fundamentally alters the stated purposes of the age requirement,
nor imposes undue financial or administrative burdens. First, as to the
safety purpose, the court in Johnson found that if a qualified student ath-
lete with a learning disability does not himself threaten the safety of the
other players because of size or weight, then the safety purpose advanced
by the age requirement is not weakened.\footnote{Johnson v. Florida High Sch. Activities Ass’n, 899 F. Supp. 579, 585 (M.D. Fla. 1995), vacated, 102 F.3d 1172 (11th Cir. 1997), appeal after remand, 103 F.3d 720 (1997).} Furthermore, as the court
asserted in Johnson, “strength and size disparities already exist through-
out the leagues and yet no comparative analysis is undertaken.”\footnote{Id. at 586 (asserting that this argument of the FHSAA makes a “mountain out of a molehill”).} By
imposing an age requirement, the athletic associations make the assump-
tion that the height and weight of an eighteen versus nineteen-year-old
adolescent vary. In fact, the average girl’s growth spurt peaks at eleven
and one-half years, and then slows to a stop at sixteen years.\footnote{NELSON TEXTBOOK OF PEDIATRICS 62 (Richard E. Behrman et al., eds., 15th ed. 1996).} The average
boy’s growth spurt peaks at thirteen and one-half years, and then
slow to a stop at eighteen years.\footnote{Id. (Muscle mass also increases during adolescence, followed several months later
by an increase in strength; boys show greater gains in both.)} Weight gain parallels linear growth,
with a delay of several months, so that adolescents seem first to stretch,
and then to fill out.\footnote{Id.}
Second, as to the fairness in competition purpose, the concern about an
unfair competitive advantage over other players is not present where stu-
dent athletes have only competed for three years at the high school level. No student athlete on the playing field has participated more than three
years unless a waiver previously has been made under the athletic regula-
tions.\footnote{See, e.g., Dennin v. Connecticut Interscholastic Athletic Conference, 913 F. Supp. 663, 669 (D. Conn. 1996), vacated, 94 F.3d 96 (2d. Cir. 1996) (the mechanism for granting transfer waivers is already in place through athletic associations).} Therefore, the athlete has not gained an extra year of talking to
the coach about strategy and ability, or experienced more playing time.\footnote{Looney, supra note 163, at 20.}

Although the Sandison court determined that modifications which
would provide an individualized assessment of student athletes would im-
outweigh the interest of providing the individual disabled athlete the opportunity to participate in the athletic program. The court in *Sandison* asserted high school coaches and hired physicians would have to weigh five criteria to assess the unfair competitive advantage of each individual player: the athlete's chronological age, physical maturity, athletic experience, athletic skill level, and mental ability to process sports strategy. However, high school coaches, with almost daily contact with their athletes, may be biased in their assessment because of personal involvement with each student athlete and the desire to see the athlete succeed. Alternatively, a family physician could more fairly determine physical maturity and mental ability to assess sports strategy at the yearly physical required by most athletic associations the summer prior to the school year. In addition, athletic organizations, such as the MHSAA and FHSAA, already have a reviewing body that meets to consider waivers of other eligibility criteria. Thus, an individualized assessment of the athletes would not impose an undue burden on the athletic association.

Balancing the benefits to learning disabled students of athletic competition and team participation against the interests advanced by athletic associations weighs in favor of a waiver of the age requirement as a reasonable modification to eligibility. The *Sandison* opinion overlooked the purpose of the ADA by stating that a waiver of the age requirement was not a reasonable accommodation because the students' learning disabilities were not "overcome," such that the students were no longer prevented from participating in high school athletics. As the Supreme Court notes, a reasonable accommodation seeks to "assure evenhanded treatment and the opportunity for handicapped individuals to participate in and benefit from the program." After an individualized determination, removing the age requirement for learning disabled athletes would give the learning disabled student the equal opportunity to participate in high school athletics for four years, or eight consecutive semesters. Thus,

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222. Id.
as the *Johnson* court held, a waiver of the age requirement in such cases would not fundamentally alter the safe and fair nature of interscholastic athletics and would at most place an incidental burden on associations.\(^{228}\)

### V. NCAA Regulations in Violation of the ADA?

Learning disabled students who challenge their denial from participating in high school athletics face the same battle in qualifying for participation in collegiate athletics. In a case of first impression, a high school student is challenging the NCAA for violating the ADA.\(^{229}\) Chad Ganden, a state champion in the 100-yard freestyle, filed suit against the NCAA in the United States District Court for the Northern District of Illinois because the NCAA denied him the privilege of being able to participate on, and benefit from, NCAA-sanctioned athletic competition.\(^{230}\)

The lawsuit is premised on the fact that Ganden took special courses for the learning disabled during high school that the NCAA refused to accept because they did not meet NCAA academic guidelines for eligibility.\(^{231}\) Ganden asked the judge to "order that the NCAA . . . be permanently enjoined from preventing Ganden from participating athletically in intercollegiate events during his freshman year."\(^{232}\)

Ganden was diagnosed with a learning disability in sixth grade.\(^{233}\) He has a decoding problem that makes it difficult to translate letters into spoken words, thus affecting Ganden’s ability to read.\(^{234}\) As a result of his learning disability, Ganden took some fundamental, or basic, courses during his freshman and sophomore years of high school before transferring into regular courses.\(^{235}\)

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\(^{228}\) *Johnson*, 899 F. Supp. at 586.


\(^{231}\) *Ganden*, 1996 U.S. Dist. LEXIS 17368, at *1. The NCAA’s eligibility requirements, effective fall of 1996, require for Division I competition: (1) a minimum of 13 high school “core courses”; and, (2) attainment of a GPA in those core courses determined by a sliding scale based upon student’s standard college entrance exam scores. *Id.* at *4-5.

\(^{232}\) *Id.* at *1.


\(^{234}\) *Id.*

\(^{235}\) *Id.*
A. NCAA Eligibility Requirements

According to NCAA Division I eligibility requirements, to receive a scholarship and compete in a Division I college sport, a student must meet a minimum score on the American College Test ("ACT") or Scholastic Assessment Test ("SAT") and a minimum grade point average ("GPA") in thirteen college preparatory courses. A "partial qualifier" is deemed eligible to practice with a team and to receive an athletic scholarship during his first year at a Division I school. A "partial qualifier" does not have to meet the requirements for a qualifier, but is required to present an acceptable GPA and SAT or ACT scores based on a separate partial qualifier index scale.

The NCAA defines a "core course" as a "recognized academic course that offers fundamental instruction in a specific area of study." For high school courses for the learning disabled or handicapped to count toward the core course requirement, the principal of the high school must submit a written letter to the NCAA. The letter must state that "students

236. THE NCAA 7-8 (1996). To curb abuses in intercollegiate football, President Theodore Roosevelt summoned college athletics leaders to the White House to encourage reforms. The Intercollegiate Athletic Association of the United States ("IAAUS") was founded by 62 members on December 28, 1905. The IAAUS was officially constituted March 31, 1906, and took its present name (NCAA) in 1910. For several years, the NCAA was a discussion group, but in 1921 the first championship was held and gradually more rules committees were formed. A national headquarters was founded in 1952 to deal with the complexity of problems the NCAA faced. In 1973, the NCAA's membership was divided into three competitive divisions. Id.

237. The American College Test stresses mastery of the high school curriculum, as opposed to the Scholastic Assessment Test ("SAT") which is a predictor of a student's ability to do college work. A Rejection Slip for the SAT, NEWSWEEK, Apr. 27, 1987, at 71.

238. Nicholas Lemann, The Structure of Success in America; Educational Testing, College Admissions, and the Social Elite, 276 ATLANTIC MONTHLY 41, 48 (1995). Carl Brigham developed his own objective admissions test for students applying to Princeton in the early 1920s. The college board then placed him in charge of a committee to develop a test that could be used for a wider group of schools. This test was called the SAT. Despite the test's name, the creators were not thinking in terms of aptitude, but educational preparedness. Id.

239. STEPHEN A. MALLONEE, 1996-97 NCAA GUIDE FOR THE COLLEGE-BOUND STUDENT-ATHLETE 2 (Michael V. Earle ed., 1996). This core curriculum consists of at least four years of English; two years of mathematics (algebra, geometry, or a high-level math course for which geometry is a prerequisite); two years of social sciences; two years of natural or physical science, including one laboratory class if offered by the high school; one additional class in English, math, or natural or physical science; and two additional academic courses. Id.

240. Id.

241. Id.

242. Id.
in such courses are expected to acquire the same knowledge as students in other core courses and that the same grading standards are employed.  

B. NCAA Eligibility Requirements Adverse to Learning Disabilities

The NCAA’s Initial Eligibility Clearinghouse declared Ganden ineligible both to receive an athletic scholarship as a freshman and to compete during his four seasons of eligibility. Michigan State University appealed, on behalf of Ganden, the Clearinghouse’s ruling to the NCAA’s Academic Requirements Committee. The Committee granted Ganden a partial waiver, allowing Ganden to practice with Michigan State and to accept a scholarship. Ganden could not, however, compete with the swim team in NCAA-sanctioned meets until the following academic year. In addition, Ganden would lose one season of eligibility. Michigan State appealed the partial waiver decision to the NCAA Council, the NCAA’s highest decision-making body, which denied Ganden’s appeal.

Ganden’s waiver was the first waiver granted by the NCAA to a student athlete with a learning disability. Ganden met the GPA and standardized test requirements, but did not meet the core course requirements. In Ganden’s junior year, 3.5 core course credits completed during his freshman and sophomore years of high school were deemed unacceptable by the NCAA. Thus, Ganden fell below the thirteen core course credit requirement.

Initially, the United States District Court for the Northern District of Illinois determined that it had subject matter jurisdiction over the NCAA

243. Id. at 3.
244. The Clearinghouse was established by the NCAA so that a uniform determination could be made of which high school classes satisfied the “core course” requirement. Ganden v. National Collegiate Athletic Ass’n, No. 96-C6953, 1996 U.S. Dist. LEXIS 17368, at *5 n.2 (N.D. Ill. Nov. 21, 1960).
245. Id. at *6; see Nakamura, supra note 233, at C4.
247. Id. at *12.
248. Id. at *4.
249. Id.
250. Id. at *12.
252. Id. The NCAA’s bylaws concerning “core courses” specifically exclude courses taught below the regular academic instruction level. Ganden, 1996 U.S. Dist. LEXIS 17368, at *5.
under Title III of the ADA. Next, the court found that Ganden could establish a "causal link" between his learning disability and the NCAA's denial of his waiver application, and, therefore, was a "qualifier." The court rejected the NCAA's argument, which relied on Sandison, for the proposition that Ganden's learning disability did not prevent him from meeting the "core course" requirement. Next, the NCAA argued that Ganden's combined GPA and ACT scores fell below the established requirements. The Ganden court found evidence that Ganden failed to take the core courses because of his learning disability, which required him to take special education classes. Thus, Ganden would likely be able to establish a causal link between his learning disability and the NCAA's failure to grant a waiver.

Next, the court addressed whether the NCAA could make any reasonable modifications to accommodate Ganden. First, the court identified the minimum GPA requirement and the defined "core course" requirements as the necessary eligibility requirements. Then, the court identified that the purpose of these eligibility requirements is to "(1) insure that student-athletes are representative of the college community and not recruited solely for athletics; (2) insure that a student-athlete is academically prepared to succeed at college; and (3) preserve amateurism in intercollegiate sports." The court initially concluded that a waiver would not "fundamentally alter" the nature of the intercollegiate athletic program. The court distinguished the case before it from Sandison and Pottgen, where both the Sixth and Eighth Circuits concluded that a waiver of the age requirement in interscholastic high school athletic programs would pose an undue burden on the athletic associations to assess, individually, each student's competitive abilities. The Ganden court rea-

254. Id. at *39.
255. Id. at *40 (citing Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026, 1033 (6th Cir. 1995)).
256. Id. at *39.
257. Id. at *40 (relying on Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663, 669 (D. Conn. 1996)).
258. Id. at *41. Title III analysis parallels Title II "otherwise qualified" analysis under the ADA, asking whether the essential eligibility requirements were met and, if not, whether any reasonable modifications exist. Johnson v. Florida High Sch. Activities Ass'n, 899 F. Supp. 579, 583 n.5 (M.D. Fla. 1995).
260. Id.
261. Id. at *44.
262. Id.
soned that the NCAA already has the Initial Eligibility Clearinghouse in place providing individual assessments of each student athlete applicant.\textsuperscript{263}

The \textit{Ganden} court followed the \textit{Johnson} district court decision by assessing each applicant’s case. The court refused to accept the analysis advanced by \textit{Sandison} and \textit{Pottgen} that questioned whether the eligibility requirements served an important interest of the program.\textsuperscript{264} The \textit{Ganden} court criticized this analysis for ignoring the central issue under the ADA: “[whether] reasonable accommodations [are] possible in light of the disability.”\textsuperscript{265} The court concluded that the correct analysis was to address the underlying purposes of the eligibility criteria to determine whether a modification of the stated purposes would be undermined in the individual plaintiff’s circumstances.\textsuperscript{266} The court found, however, that the underlying purpose of the NCAA eligibility requirements would be undermined in Ganden’s individual circumstance.

The court in \textit{Ganden} determined that Ganden’s request for a waiver to be certified a “qualifier” would fundamentally alter the particular accommodation provided by the NCAA.\textsuperscript{267} The court found that the NCAA accommodated Ganden by providing him an individualized assessment through a subcommittee that considered Ganden’s disability, his efforts to overcome it, and his academic success during his final two years of high school.\textsuperscript{268} In Ganden’s case, the court determined that the evidence in the record before it demonstrated that the remedial courses taken by Ganden were not “remotely similar” to the NCAA’s “core course” requirement.\textsuperscript{269} Furthermore, the court contended that it would be unreasonable to require the NCAA to lower the GPA requirement because it would undermine the NCAA’s objective to assess a student’s academic potential.\textsuperscript{270} According to the court, it was less drastic to modify the core

\textsuperscript{263.} \textit{Id.} \\
\textsuperscript{264.} \textit{Id. at *45.} \\
\textsuperscript{265.} \textit{Id.} (relying on \textit{Johnson}, 899 F. Supp. at 584). \\
\textsuperscript{266.} \textit{Id. at *45.} \\
\textsuperscript{267.} \textit{Id. at *46.} \\
\textsuperscript{268.} \textit{Id. at *49.} \\
\textsuperscript{269.} \textit{Id. at *47.} The NCAA’s “core course” requirements serve as an indicator of a student’s academic capabilities. \textit{Id.} \\
\textsuperscript{270.} \textit{Id. at *48.} See Edwards, \textit{supra} note 77, at 230. The Supreme Court has identified the four essential freedoms of a university as: “determining for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be permitted to study.” Sweezy v. New Hampshire, 354 U.S. 234 (1957). Although the legislature has increased the involvement of courts, deference is given with respect to “an applicant’s qualifications and whether he or she would meet reasonable standards for academic and
Thus, the court concluded that the NCAA, after an individualized assessment, had made a reasonable modification for Ganden's particular circumstances by granting him "partial qualifier" status. Therefore, the court denied Ganden's request for a preliminary injunction because his claim under the ADA would likely fail due to his inability to prove discrimination under Title III.

VI. PRACTITIONERS' GUIDE TO BRINGING A CLAIM ON BEHALF OF A LEARNING DISABLED STUDENT ATHLETE UNDER THE ADA

As noted above, to establish a prima facie case of disability discrimination under the ADA, a plaintiff must show that he was denied participation because of his disability. The burden then shifts to the entity charged with discrimination, which must show that the eligibility requirements are essential to the program and that the plaintiff cannot meet these requirements despite reasonable modifications. Thus, when a student athlete has been denied participation on either an interscholastic or intercollegiate athletic team, the first step in bringing a viable claim under the ADA is to establish that the discrimination is "by reason of [the learning] disability."

The Sandison and Pottgen decisions held that the appropriate test under this part of the prima facie case was whether absent the disability the student athlete could meet the established eligibility requirements. In those cases, the courts found that absent the student athletes' respective learning disabilities, the students could not meet the age requirement for participation in interscholastic high school athletics because of their birth dates. In Ganden, however, the Illinois District Court adopted the "causal link" test used by the court in Dennin v. Connecticut Inter-

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272. Id.
273. Id. at *51-52.
274. See supra notes 92-99 and accompanying text.
275. See supra notes 100-15 and accompanying text.
278. Id.
scholastic Athletic Conference, Inc. Under the "causal link test," the student athlete must demonstrate that, but for his diagnosed learning disability, he could not meet the established eligibility requirements.

The next step in establishing a prima facie case of disability discrimination under the ADA is to determine what the essential eligibility requirements of the program are, and the underlying purpose for such requirements. Both the Department of Justice regulations and the Supreme Court’s holding in Arline state that an individual inquiry is necessary at this point to determine if the individual meets the established requirements. If the court determines that these eligibility requirements are in fact essential to the program, the challenged entity must show why modifications to these requirements would not be reasonable. Reasonableness is determined by asking whether the proposed modification would substantially or fundamentally alter the nature of the program or impose undue financial burdens.

To determine whether a modification to existing eligibility requirements is reasonable, the Sixth and Eighth Circuit courts look to see whether the eligibility requirements serve any important interests of the program. However, the district courts in Johnson, Dennin, and Ganden, applied a balancing test that weighed the interests of the student athlete against the interests of the association. The individualized assessment effectuates the purpose of the ADA because, as the court stated in Ganden, a "modification of a rule rationally tailored to the denied priv-


280. Id.


282. See supra notes 189-203 and accompanying text.

283. See supra notes 206-07 and accompanying text.

284. See supra notes 208-13 and accompanying text.


ilege would [always] be unreasonable."\textsuperscript{287} Thus, to eliminate discrimination against individuals,\textsuperscript{288} which is often the product of "thoughtlessness and indifference—of benign neglect," not invidious acts of discrimination,\textsuperscript{289} an individual assessment is necessary.

\textbf{VII. Conclusion}

The \textit{Johnson} district court decision, though a well-reasoned and logical analysis under the ADA, illustrates the confusion and uneven application of the ADA to learning disabled athletes who want to participate in interscholastic athletics. Furthermore, recent claims, similar to Chad Ganden’s against the NCAA, demonstrate that interpretation issues under the ADA must be resolved to provide for just and uniform results. Without additional guidance from the Department of Justice, the vague terms encompassed in the statutory language of the ADA will continue to be interpreted differently by individual courts, thus obviating the purpose of the ADA: to protect the disabled from unintentional and indifferent means of discrimination.

This ambiguity invites the courts to assume a more active role in reviewing the ADA and its implementing regulations. However, the judiciary’s function is not to sit as a super-legislature and to determine what the terms "reasonable modification" and "by reason of such disability" actually mean. Rather, the judiciary should take a closer look at the regulations and case law under the ADA and the Rehabilitation Act to ensure that it is logically interpreting these important pieces of civil rights legislation for the disabled. Moreover, the conflicting interpretations may indicate that the United States Supreme Court needs to provide clarification on the statutory language. The effects of these lower court decisions will be long felt by the individual student athletes who are denied participation, and will serve as blatant reminders that their learning disability was the cause of this denial.

\textsuperscript{287} \textit{Ganden}, 1996 U.S. Dist. LEXIS 17368, at *45.
\textsuperscript{288} 42 U.S.C. §§ 12101-12213.
\textsuperscript{289} Alexander v. Choate, 469 U.S. 287, 295 n.12 (1985).